

July 23, 2002

PUBLIC UTILITIES COMMISSION
Procedures for Conservation Program Planning

ORDER ESTABLISHING
PROCEDURE AND SCHEDULE
FOR CONSERVATION
PROGRAMS IMPLEMENTED
PURSUANT TO P.L. 2001, CH. 624

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

This Order establishes the procedure and discusses the schedule that the Maine Public Utilities Commission will follow to develop an electric energy conservation plan pursuant to P.L. 2001, ch. 624 (the Conservation Act).

II. BACKGROUND

The Conservation Act, enacted during the second session of the 120th Legislature, establishes terms that govern an electric energy conservation program in Maine. Section 4 of the Act (codified at 35-A M.R.S.A. § 3211-A) directs the Maine Public Utilities Commission (Commission) to develop and implement electric energy conservation programs that are consistent with the goals and objectives of an overall energy conservation program strategy that the Commission must establish. The programs must be cost effective, according to a definition that the Commission also must establish. Various other statutory directives require the Commission to promulgate rules and hold public hearings.

On April 26, 2002, we issued a Proposed Order that described the proceedings we intended to conduct to carry out our responsibilities under the Conservation Act, as well as a schedule for these proceedings. We invited comments on our proposed process and schedule. We received comments from Central Maine Power Company (CMP) and the Public Advocate. The Public Advocate's comments were endorsed by AARP, Natural Resources Council of Maine, Maine Community Action Association of Maine, Maine Global Climate Change, the Coalition for Sensible Energy, the Thayer Corporation, Horizon Energy Services and the Maine Center for Economic Policy.¹ We will address the comments throughout the body of this Order.

¹In addition, the Public Advocate consulted with the Maine Energy Efficiency Coalition and the Maine Electric Consumers Coalition in preparing his comments.

III. CONSERVATION-RELATED PROCEEDINGS

The Act directs the Commission to develop and implement conservation programs. In order to do so, the Commission will conduct the following proceedings.

A. Rulemaking Proceedings

1. Cost Effectiveness

Section 3211-A(2) requires that programs we implement be cost-effective, as defined by the Commission by rule or order. In the April 26 Proposed Order, we stated that we intended to define “cost effectiveness” by order, at the conclusion of a non-adjudicatory proceeding.

Both CMP and the Public Advocate commented that cost effectiveness, for purposes of now-repealed section 3211, is defined in a Commission rule, chapter 380. Both suggested that it seems logical that the Commission continue to define cost effectiveness in an amended chapter 380.

We agree. Because of the statutory change, the Commission must amend chapter 380. We can define cost effectiveness as part of the rulemaking process to promulgate an amended chapter 380.

2. Low-Income Customers and Small Business Consumers

Section 3211-A(2)(B) requires that the Commission define “low-income residential consumers” and “small business consumers” by rule. We will thus define these terms as part of a rulemaking proceeding.

3. Establishing Procedures Governing Selection of Service Providers

Section 3211-A(3)(c) exempts the Commission from rules adopted by the State Purchasing Agent when selecting service providers to implement conservation programs. Instead, the section directs the Commission to adopt its own rule to govern the solicitation process.

The Commission will conduct two rulemaking proceedings for these matters. In one, the Commission will amend its chapter 380. Within the amended chapter 380, the Commission will define cost effectiveness, low-income residential consumers and small business consumers, as well as make any other changes necessary to update Chapter 380.

The Commission has already conducted an inquiry on the definition of low-income residential and small business consumers (Docket No. 2002-272). A separate inquiry on cost effectiveness is not necessary because the interim program selection process (Docket No. 2002-161) provided the opportunity for interested persons to comment on "cost effectiveness" to the Commission. The rulemaking process will allow further comments. The Commission staff is in the process of drafting an amended chapter 380 and expects to begin the formal rulemaking process in August, 2002.²

By separate rulemaking process, the Commission will promulgate a rule to govern its service provider selection process. In Docket No. 2002-272, the Commission also conducted an inquiry on the service provider selection process. Subsection (3)(C) directs the Commission to consult with the State Purchasing Agent in developing this rule. The Commission will do so in the next month. After that, the Commission will draft a proposed rule and initiate the formal rulemaking process. We expect to deliberate a proposed rule in August.

B. Non-Adjudicatory Proceedings

1. Objectives and Overall Energy Strategy

Section 3211-A (2) of Title 35-A requires that the Commission establish objectives and an overall energy strategy for conservation programs and that programs we implement be consistent with our objectives and strategy. We also are to determine a schedule to revise our objectives and strategy.

In our April 26 Proposed Order, we suggested that we establish objectives and an overall energy strategy in a non-adjudicatory proceeding. CMP agreed that this process "makes sense." The Public Advocate did not object to our procedural suggestion.

We will proceed to establish objectives and an overall strategy by order. In considering interim programs, we have investigated goals and strategies in other states and the success of programs in meeting those goals. We have received comments from many interested persons and have conferred with others. We will issue a proposed order and provide an opportunity for written and oral comments, prior to issuing a final order. The objectives/strategy proceeding will occur concurrently with the chapter 380 rulemaking discussed in the previous section.

²We will consider comments submitted in Docket No. 2002-161 when preparing our proposed rule.

2. Conservation Plan, Including Funding Level and Economic Potential Study

The Commission must consider and develop a program plan, a list of conservation programs that are consistent with our objectives and strategy, are cost-effective and fit within the funding level we establish. We also must choose the means by which we will implement these programs.

In our April 26 Proposed Order, we stated that we would develop our program plan, and establish the funding level, by means of a non-adjudicatory proceeding that would commence after we established objectives and strategy and defined cost effectiveness. To inform our funding decisions, we stated our intent to hire a consultant to conduct an economic potential study to estimate the potential cost-effective kWh savings in Maine.

CMP objected to the Commission's setting funding levels in a non-adjudicatory proceeding. CMP stated that funding levels must be set using an adjudicatory process because the Commission must make factual determinations. In addition, CMP argued that setting funding levels is essentially a ratemaking exercise as conservation assessments must be included in rates. CMP asserts that ratemaking is by definition accomplished by adjudicatory proceeding.

CMP also objected to a statement within the April 26 Proposed Order that the Conservation Act does not prohibit using funds collected from one T&D utility to implement programs in another utility's service territory. CMP disagreed and concluded that the Act does restrict funds from being spent in other utility service territories.

The Public Advocate also suggested that funding determinations should be made in an adjudicatory proceeding. In his view, each utility's funding level "requires a level of due process that assures an opportunity for full participation by representatives of all viewpoints." Deciding funding levels, in the Public Advocate's view, requires an evidentiary record. He stated that his office intends to submit testimony on the potential for economic conservation of electricity in each utility's service territory in Maine, as well as on the design of specific conservation measures, their evaluation and cost effectiveness based on the All-Ratepayers Test. Thus, the Public Advocate urged the Commission to reconsider, and determine funding levels and consider economic potential studies as part of an adjudicatory proceeding.

In more recent communication with Commission Staff, the Public Advocate stated that his consultants will be able to submit their economic potential study by early September. He suggested that all such studies be submitted by then, and that all study authors be subject to discovery and cross-examination.

CMP and the Public Advocate appear to agree that the development of the program plan itself can (or even should) be conducted as a non-adjudicatory matter. Before developing its program plan, however, the Commission intends to determine funding levels. And before deciding funding levels, the Commission will consider studies on the potential for cost-effective conservation in each of the T&D utilities' service territories. In the April 26 Proposed Order, we stated that the Commission would hire a consultant to perform an economic potential study. Now that the Public Advocate has done so, the Commission will not. It does not seem efficient for two state agencies to hire consultants to perform ostensibly identical tasks.

The question remains whether the funding and economic potential issues should (or must) be decided in an adjudicatory proceeding. An adjudicatory proceeding is defined as

any proceeding ... in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.

5 M.R.S.A. § 8002(1). Our decisions about the potential for cost-effective conservation in the State, about whether T&D service territories should be treated with proportional equivalence in regards to implementing programs, and even whether our conservation program should be funded at the minimum, maximum or other level, are not matters that determine rights, duties, or privileges of specific persons. Moreover, unlike many other provisions in Title 35-A, the Conservation Act does not require a hearing before deciding these matters. Thus, we conclude that an adjudicatory process is not required.³

In our view, even on a discretionary basis, an adjudicatory process is not warranted. We believe it is unlikely that there will be factual disputes for which hearings and cross-examination will be necessary or even helpful. Determining the characteristics of the utility service territories is fairly straightforward. While there may be disagreement about the total economic potential for cost-effective conservation, our investigation of other states' programs leads us to conclude that applying an All-Ratepayers Test, or a similar test, as the test for cost effectiveness, it is highly likely that the economic potential for cost-effective conservation will be well beyond the statutory maximum funding amounts in all service territories. Our investigation also indicates that other states typically apply an All-Ratepayers Test, or similar test,

³CMP correctly asserts that our funding decisions will affect utility rates, but it is lawful for rulemaking proceedings to affect rates, *New England Tel. & Tel. v. PUC*, 705 A.2d 706 (Me. 1997), so all matters that affect rates need not be adjudicatory.

to determine cost effectiveness. If we follow this fairly typical approach, resolution of the possible factual dispute about the exact amount of cost-effective potential therefore likely will be unnecessary. If we decide upon another cost effectiveness test, or for any reason, we are presented with evidence of limited potential within Maine, we will reconsider our conclusion and determine the best means for resolving any factual dispute.

We do expect that there will be disagreements about many of the policy determinations the Commission must make. For example, whether departure from "proportional equivalence" among utilities is justified and whether spending at the cap or floor (or somewhere in between) is proper will require policy decisions. We remain convinced that resolution of these policy questions are best conducted by providing opportunity for written comments (or argument) followed by an opportunity for oral argument, in which we can pose questions to interested persons. The same process is also preferred to resolve disputes over questions of law. Indeed, we are concerned that, if an adjudicatory proceeding is initiated to consider economic potential, the ex parte requirements will make useful policy discussion difficult and often impossible. Ex parte requirements will also hamper our ability to discuss with interested persons interim and permanent programs we must develop during 2002 and interim programs we must implement during 2002 because of the difficulty of separating funding issues from other program issues.

To conclude, we will decide funding and economic potential issues, and thereafter decide upon a program plan. We will do so after we conclude the rulemaking to define cost effectiveness. We direct the Public Advocate, and any other interested person, to file economic potential studies by September 10, 2002. We do not believe that traditional discovery requests will be necessary or efficient. We will schedule a technical conference so that the Public Advocate consultants (and any other person who submits a study) will be available to answer questions. The conference will provide all interested persons the opportunity to understand the economic potential studies.

At the end of the technical conference (or at a later conference as ordered by the Presiding Officer), interested persons will have the opportunity to discuss the need or desirability of holding evidentiary hearings and conducting the resolution of the funding and economic potential decisions as an adjudicatory hearing (or for that matter, as a rulemaking). At this time, we do not anticipate holding an evidentiary hearing. Instead, shortly after the technical conference, interested persons will have the opportunity to file written comments. The Commission Staff, either at the technical conference or through a later procedural order, will pose particular questions that the Commission wants interested persons to address. We will also provide the opportunity for reply comments and an oral argument. The Commission will then decide the funding and economic potential issues.

Thereafter, the Commission will propose a Program Plan, seeking either written or oral comments or both, before deciding on a Program Plan about Dec. 1, 2002.

C. Other Proceedings

1. Employee Transition Benefit Plans

Section 6 of the Conservation Act permits T&D utilities to establish transition benefit plans for their conservation-related employees. Such plans must be filed with the Commission within 120 days of the effective date of the Act. The Commission must review each plan, and if the Commission finds it reasonable, the Commission must approve the plan. In our April 26 Proposed Order, we stated that any plan filed for approval would be processed as an adjudicatory proceeding.

CMP replied that, as legal rights, duties or privileges of specific persons would be determined by such a plan, the Commission was correct to conduct the approval process as an adjudicatory process. CMP also stated that August 4, 2002 is the deadline for filing a plan, and that it might be difficult to meet that deadline since the utilities were not certain how long utility programs would be operated as interim programs.

CMP raises an important point concerning the filing deadline. We direct each T&D utility to provide a list of persons performing functions related to conservation to the Commission by July 30, 2002. We will hold a conference on **August 1, 2002 at 2:00 p.m.** to discuss employee transition benefit plans with CMP, BHE and MPS.

D. Other Conservation-Related Activities

The Public Advocate accepted our invitation to comment on other administrative tasks or means to obtain stakeholder input.

1. Commission and Staff Meetings with Stakeholders

The Public Advocate encouraged the Commission to meet with individual stakeholders. He recommended, however, that we provide notice of such meetings, so that all interested persons would know with whom the Commission or Staff was meeting.

On our web page, we have maintained a list of the persons (or the organizations they represent) with whom the Commission staff has met on conservation-related topics. Since the Public Advocate seems concerned just that other stakeholders know of the meetings and not that such meeting should be open to the public, we do not know why advance notice of such meetings

would be helpful. We believe our practice provides the Public Advocate with the information he desires.

2. Advisory Council

The Public Advocate urges us to convene an Advisory Council to “undertake a substantive overview of programs, planning criteria, and cost effectiveness criteria in a collaborative effort among all the parties.”

At this time, we will not seek to form an Advisory Council. We believe the process we have followed in implementing interim programs and the process we will follow in implementing “long-term” programs, has provided and will continue to provide all stakeholders with a fair opportunity to present their views to the Commission. An Advisory Council is not necessary to achieve a satisfactory opportunity for input.

An Advisory Council may be helpful if we hoped to establish and implement the Program Plan by collaboration. The timetable that we believe the Legislature intended the Commission to achieve in carrying out our responsibilities does not permit us to implement our plan by collaboration. An Advisory Council is not necessary, therefore, to assist a collaborative effort.

The Public Advocate also suggests an Advisory Council would allow the Commission to receive stakeholder input after the actual program plan is implemented. We believe this suggestion may have merit. However, at this point, we believe the plan and delivery mechanism are not defined sufficiently to know how best to achieve ongoing public or stakeholder input. While establishing an ongoing program delivery approach, we will consider the Public Advocate’s suggestion for an ongoing advisory council.

Dated at Augusta, Maine, this 23rd day of July, 2002.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

THIS DOCUMENT HAS BEEN DESIGNATED FOR PUBLICATION

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.